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No. 87-692

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES M. STARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court abused its discretion by excluding a videotape of petitioner's interview with a defense psychiatrist.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-9a) is reported at 24 M.J. 381. The opinion of the Army Court of Military Review (Pet. App. 10a-25a) is reported at 19 M.J. 519.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 31, 1987. The petition for a writ of certiorari was filed on October 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at Fuerth, West Germany, petitioner, a member of the United States Army, was convicted of murder, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 10a-25a). Upon discre-

tionary review, the Court of Military Appeals also affirmed (Pet. App. 1a-9a).

1. Emily Stark arrived in Fuerth, Germany, on August 8, 1982, to join petitioner, her husband. Eleven days later, petitioner killed his wife by suffocating her on a deserted road near the house where she was staying (GXs 2, 6; Tr. 558-560, 581-582).

2. a. Petitioner later retained a forensic psychiatrist, Dr. Robert Rollins, to assess his sanity at the time of the crime (Tr. 574). Dr. Rollins interviewed petitioner at Nuremberg, Germany, on September 9 and 10 and videotaped the interviews, which lasted a total of about five hours (Tr. 535, 557, 578, 593, 732).[1] Dr. Rollins, petitioner, and his defense counsel were the only persons present (see Tr. 681). Dr. Rollins claimed that he hypnotized petitioner to enhance petitioner's concentration on the events of the crime (Tr. 659-660, 736).

At trial, petitioner relied exclusively on an insanity defense presented through Dr. Rollins.[2] Before Dr. Rollins testified, defense counsel moved to admit the videotapes of his interviews of petitioner. The defense claimed that the tapes were admissible on the ground that they demonstrated the basis for Dr. Rollins' opinion, that the tapes were a statement against petitioner's interest, and that they were not hearsay, because they were not offered for the truth of the matters asserted (Tr. 535-541).[3] The government objected on the grounds that the videotapes would mislead the court members and would allow peti-

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[1] The Court of Military Appeals stated that the tapes would have allowed petitioner to present eight hours of testimony (Pet. App. 8a). That court appears to have erred in suggesting that the videotapes were eight hours long.

[2] Petitioner did not testify at trial.

[3] See Mil. R. Evid. 403, 703, 801(c), and 804(b)(3). Those provisions are identical to the corresponding provisions in the Federal Rules of Evidence.

tioner to testify without being cross-examined (Tr. 536). The trial judge refused to admit the videotapes, but stated that Dr. Rollins could testify about the procedures he used and the bases for his opinion (Tr. 537-538).

Thereafter, Dr. Rollins testified that petitioner had a "passive/aggressive personality" and suffered from an "adjustment disorder with mixed disturbance of emotions and conduct" (Tr. 551, 568). Dr. Rollins found it "probable or likely" that petitioner lacked substantial capacity to conform his conduct to the requirements of the law (Tr. 573; see Tr. 569). In rebuttal, the prosecution called two psychiatrists, Dr. John Traylor and Dr. Gilbert Eggen, and a forensic psychologist, Dr. Harold Hall, who had separately examined petitioner before trial as members of a sanity board.[4] Each expert testified that petitioner suffered from a personality disorder,[5] but that petitioner did not lack a substantial capacity to conform his conduct to the requirements of law or to appreciate the criminality of his conduct (Tr. 615-616, 661-662, 710).

b. The question whether petitioner had been hypnotized during the interviews by Dr. Rollins came up when Dr. Hall testified for the government in rebuttal.[6] Based in

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[4] Pursuant to para. 121 of the *Manual for Courts-Martial, United States – 1969* (rev. ed.), a sanity board could be convened by the convening authority prior to trial if an inquiry into the mental condition of the accused was necessary, and in this case the convening authority ordered such an inquiry (Tr. 607-610). The board was required to examine petitioner and to render findings as to whether petitioner had the capacity to understand and participate in the proceedings against him, and whether he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *Ibid.*

[5] Dr. Traylor and Dr. Hall diagnosed petitioner as having a mixed personality disorder and a history of alcohol abuse (Tr. 612-613, 661). Dr. Eggen's diagnosis indicated an anti-social personality disorder and alcohol abuse (Tr. 710-712).

[6] Dr. Hall wrote his master's degree thesis on hypnosis and memory under varying conditions (Tr. 653).

part on the results of the psychological tests administered to petitioner[7] and his own review of the videotaped interviews, Dr. Hall concluded that Dr. Rollins had misdiagnosed petitioner. Dr. Hall indicated that he had reviewed approximately 90 minutes of the videotaped interviews, including much of the portion where petitioner was allegedly hypnotized (Tr. 656). Dr. Hall criticized the hypnotic interview used by Dr. Rollins. Dr. Hall stated, inter alia, that the period during which petitioner was allegedly placed under hypnosis was too short to produce the requisite trance for forensic purposes, and that petitioner was not really under hypnosis, since he reacted to some environmental sounds, although he slightly modified his criticisms during cross-examination (Tr. 663-664, 681-682, 684).[8] Dr. Hall was also of the opinion that petitioner attempted to influence the results of the psychological tests (Tr. 669, 694-698).

Dr. Rollins responded to the criticisms in surrebuttal. He testified that he used a special, rapid-induction method known as the "Spiegel Technique" to place petitioner under hypnosis. He also said that only a light trance was necessary to achieve his purpose, and that petitioner was

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[7] During the interview, Dr. Rollins administered a psychological test, the Minnesota Multiphasic Personality Inventory (MMPI). Dr. Hall also administered the MMPI to petitioner as part of his examination (Tr. 655). Dr. Hall testified that the results of the MMPI conducted by Dr. Rollins were similar to and consistent with the MMPI tests that he administered (Tr. 672-674).

[8] Dr. Hall also stated that (1) Dr. Rollins' suggestions when inducing hypnosis were designed to induce relaxation, rather than deep concentration; (2) there was an unacceptable level of background noise during the session; and (3) petitioner could not levitate his hand without assistance, indicating that he was under only a light or medium trance. On cross-examination, Dr. Hall stated that petitioner's reaction to noise was less than would ordinarily occur and that petitioner's arm remained in an elevated position during the session (Tr. 681-682, 684).

in a light trance (Tr. 734-736). Dr. Rollins also denied that petitioner reacted to noises while he was hypnotized (Tr. 736). The court members then recalled Dr. Hall.[9] He testified that he did not know of the "Spiegel Technique" by name, but that there were several hundred different methods of hypnotic induction (Tr. 760-761). He also said that the technique used by Dr. Rollins was not a common method for inducing hypnotism, because it did not use a progression of suggestions, which is the general practice, and that he had "some misgivings" about Dr. Rollins' technique (Tr. 761).

Defense counsel renewed his request to admit the tapes after Dr. Rollins testified in surrebuttal, and the trial judge again denied the request (Tr. 749-757). The judge explained that exhibiting the videotapes was unnecessary to allow the trier of fact to decide what weight to give to Dr. Rollins' testimony, and that playing the videotapes was a "lefthanded way" of allowing petitioner to testify without undergoing cross-examination (Tr. 755-757).[10]

ARGUMENT

1. There is no conflict among the circuits on the question presented by this case. Only two federal courts of appeals have addressed the admissibility of videotapes of interviews with the accused in similar situations, and the decisions of both courts are fully consistent with the ruling of the Court of Military Appeals in this case. In *United*

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[9] Members of a court-martial panel are permitted to request that witnesses be called and, through the military judge, to question them. Art. 46, UCMJ, 10 U.S.C. 846; *1969 Manual,* para. 54*b*.

[10] During sentencing, the trial judge allowed petitioner to play a portion of the taped interviews in which he described his relationship with his wife (Tr. 877-894). The evidence was admitted as part of petitioner's "unsworn statement." The accused is permitted to make an unsworn statement (or to testify) to assist the panel members fix an appropriate sentence. *1969 Manual* para. 75*c*(2).

States v. *McCollum,* 732 F.2d 1419 (9th Cir.), cert. denied, 469 U.S. 920 (1984), the defendant did not testify, but sought to introduce a videotaped interview with a forensic hypnotist during which the defendant recounted an allegedly "enhanced" version of the events while supposedly under hypnosis. The court of appeals upheld the trial court's exclusion of the videotape, holding that a trial judge has the discretion to exclude such evidence. 732 F.2d at 1422-1423. The trial judge did not abuse his discretion, the Ninth Circuit held, since the defense expert was able to describe the accused's statements while he was allegedly under hypnosis and because admitting the videotapes would have permitted the defendant to offer testimony without subjecting himself to cross-examination by the government. *Ibid.* Accord *United States* v. *Hearst,* 563 F.2d 1331, 1348-1349 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978) (the trial judge did not abuse his discretion in denying the admission of a one and three-quarters hour taped interview when the psychiatrists were fully capable of communicating to the jury the bases of their opinions and the defense did not seek to introduce only a representative sample of the tapes). Similarly, in *United States* v. *Mest,* 789 F.2d 1069 (4th Cir. 1986), cert. denied, No. 85-7202 (Oct. 6, 1986), the court of appeals, relying on *McCollum,* upheld the exclusion of the videotape of a psychiatric interview of the defendant while he was allegedly under hypnosis, for the same reasons given by the Ninth Circuit in *McCollum.* 789 F.2d at 1073-1074. None of the cases cited by petitioner are to the contrary.[11]

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[11] Only one of the cited cases is similar to this one, and the court in that case did not decide the question presented here. *Pratt* v. *State,* 39 Md. App. 442, 453, 387 A.2d 779, 786 (1978) (not deciding whether trial court erred in refusing to admit videotape of psychiatric interview of defendant), aff'd on other grounds, 284 Md. 516, 398 A.2d 421 (1979). The remaining cases are inapposite. See *United States* v. *Torniero,* 735 F.2d 725 (2d Cir. 1984), cert. denied, 469 U.S. 1110 (1985)

2. A trial judge has considerable discretion in making the determination whether the probative value of evidence outweighs its prejudicial effect, and his decision will not be reversed on appeal unless he abuses that discretion. *Hamling* v. *United States,* 418 U.S. 87, 124-125, 127 (1974). In this case, the trial judge did not abuse his discretion, for several reasons.

First, a defendant does not have the right to testify without being subject to cross-examination by the government. *E.g., McGautha* v. *California,* 402 U.S. 183, 216 (1971); *Brown* v. *United States,* 356 U.S. 148 (1958); *Fitzpatrick* v. *United States,* 178 U.S. 304, 314-316 (1900). The trial court was properly concerned that admitting the videotapes would have allowed petitioner to evade the government's right to challenge his statements and actions during the interviews with Dr. Rollins. See *United States* v. *Mest,* 789 F.2d at 1073; *United States* v. *McCollum,* 732 F.2d at 1423; *State* v. *Chase,* 206 Kan. 352, 480 P.2d 62 (1971) (even when a proper limiting instruction is given,

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(compulsive gambling cannot establish an insanity defense); *United States* v. *Clifford,* 704 F.2d 86 (3d Cir. 1983) (district court erred in refusing to permit the government to introduce examples of the defendant's cursive handwriting); *United States* v. *McRary,* 616 F.2d 181 (5th Cir. 1980) (trial court erred in excluding the testimony of the accused's wife and the defense psychiatrist and psychologist in support of an insanity defense); *United States* v. *Ives,* 609 F.2d 930 (9th Cir. 1979), cert. denied, 445 U.S. 919 (1980) (trial court erred in excluding all of the accused's medical records for a five-year period); *United States* v. *Ariza-Ibarra,* 605 F.2d 1216 (1st Cir. 1979) (trial court did not erroneously admit the entire transcript of a recorded conversation between the defendant and a co-conspirator); *United States* v. *Dwyer,* 539 F.2d 924 (2d Cir. 1976) (trial court erred in prohibiting second defense psychiatrist from testifying); *United States* v. *Onori,* 535 F.2d 938 (5th Cir. 1976) (trial court's handling of proposed prosecution and defense versions of the transcripts of recorded conversations was not reversible error); *United States* v. *Smith,* 507 F.2d 710 (4th Cir. 1974) (trial court erred in denying defendant opportunity to show past period of abnormal behavior to support an insanity defense).

there is a danger that the trier of fact will consider videotapes for the substantive content of the subject's statements).[12]

Petitioner's claim (Pet. 8) that the videotapes were "demonstrative" rather than "testimonial" evidence is not supported by his actions at trial. The dispute between the experts for the government and the defense was primarily over Dr. Rollins' hypnotic technique, which occupied only a small portion of the videotapes, but petitioner did not seek to introduce only that portion to support Dr. Rollins' conclusions. Petitioner's attempt to introduce the entire videotape supports the trial judge's conclusion that petitioner was making a "left-handed" attempt to testify.

Second, exclusion of the videotapes did not materially interfere with petitioner's opportunity to present his insanity defense. The question for the trier of fact to decide was whether petitioner was sane at the time of the crime, and petitioner had a full and fair opportunity to present his insanity defense to the court-martial panel. The trial judge placed no limitation on petitioner's opportunity to testify in his own defense, on Dr. Rollins' ability to give his opinion as to petitioner's sanity, or on Dr. Rollins' opportunity to explain the bases of that opinion, including describing petitioner's mental state during the interviews while petitioner was allegedly under hypnosis. Whether petitioner in fact was under hypnosis during the interviews was, at most, only a peripheral matter at trial. In these circumstances, the trial judge's ruling did not undermine petitioner's ability to offer an insanity defense or to bolster the opinions of his expert. See *United States* v. *McCollum*, 732 F.2d at 1423; *United States* v. *Hearst*, 563 F.2d at 1349; see also *United States* v. *Mest*, 789 F.2d at 1074.

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[12] There is no merit to petitioner's analogy (Pet. 7) between his videotapes and the photographs used by the pathologist to explain the cause of the victim's death (Tr. 464-470). The autopsy photographs did not present a matter reasonably subject to dispute, and the skill with which the autopsy was performed was not questioned.

Finally, playing the videotapes would have been extraordinarily time-consuming for a matter of marginal relevance, at most. As we have noted, petitioner did not attempt to introduce just a representative sample of the interviews, rather than all five hours of videotapes. Five hours of videotapes on a peripheral subject would have unduly burdened the trier of fact, and it was within the trial judge's discretion to exclude the videotape on that ground. *United States* v. *Hearst*, 563 F.2d at 1349.[13]

3. Petitioner's reliance (Pet. 7, 11) on *Rock* v. *Arkansas*, No. 86-130 (June 22, 1987), and *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), is misplaced. To begin with, petitioner did not claim at trial that the trial judge's ruling violated the Compulsory Process Clause (Tr. 534-540, 749-756), nor did petitioner argue on appeal that the Compulsory Process Clause was violated. In fact, petitioner conceded at trial that the admissibility of the videotapes was within the trial court's discretion (Tr. 539, 751). Petitioner has therefore waived his Compulsory Process claim. In any event, that claim lacks merit.

In *Chambers* and *Rock*, the evidentiary rule at issue arbitrarily denied a defendant the opportunity to introduce crucial exculpatory evidence, and the Court's ruling in each case was limited to restrictions of that type. *Rock*, slip op. 11.[14] By contrast, the trial court in this case did

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[13] Petitioner is wrong in claiming (Pet. 7, 8) that the trial judge should have viewed the tapes before ruling on their admissibility. By the time the experts had finished their testimony, the trial judge was aware of the contents of the tapes and therefore could rule on the admissibility of the tapes without examining them himself. *United States* v. *Hearst*, 563 F.2d at 1349 n.14.

[14] *Chambers* v. *Mississippi* found invalid the combined application of the state's voucher rule, under which a defendant was bound by the testimony of a defense witness, who could not be cross-examined, and the state's hearsay rule, which "mechanistically" excluded testimony that bore assurances of trustworthiness and was corroborated by other evidence. 410 U.S. at 296, 302. In *Rock* v.

not arbitrarily exclude crucial defense evidence. The defense expert was free to explain the bases for his conclusions, and the defendant was free to testify. Both parties had an equal opportunity to attack and defend the credibility of the experts. By denying petitioner the opportunity in effect to testify free from cross-examination, the trial judge simply ensured that the prosecution and the defense were on an equal footing.[15]

Arkansas, the Court ruled that a state may not adopt a per se rule prohibiting a defendant from offering his own hypnotically refreshed testimony. The Court explained that, absent clear proof that all hypnotically refreshed testimony is too unreliable to allow before the jury, a per se rule arbitrarily restricts the defendant's opportunity to offer potentially exculpatory testimony that could be proved reliable in his own case. Slip op. 17.

[15] Petitioner asserts (Pet. 5) that the courts below created a per se rule excluding videotapes of hypnotically enhanced testimony. That assertion is in error. The Court of Military Appeals explicitly stated that such evidence is not per se inadmissible. Pet. App. 6a ("although we agree with the Court of Military Review's conclusion that the tapes were not *per se* inadmissible because of the influence of 'hypnosis' on the interviews, we do not attempt to fashion a rule of law governing this type of testimony"). The decisions of the courts below were therefore not in any way inconsistent with this Court's conclusion in *Rock* v. *Arkansas, supra,* that a state may not adopt a per se rule prohibiting the defendant from testifying after her recollection is hypnotically refreshed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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